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IN THE

SUPREME COURT OF THE UNITED STATES

HARRY C. DEVORE,
Appellant,

vs. :: No. 740

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,
Appellees.

JURISDICTIONAL STATEMENT AND APPENDIX

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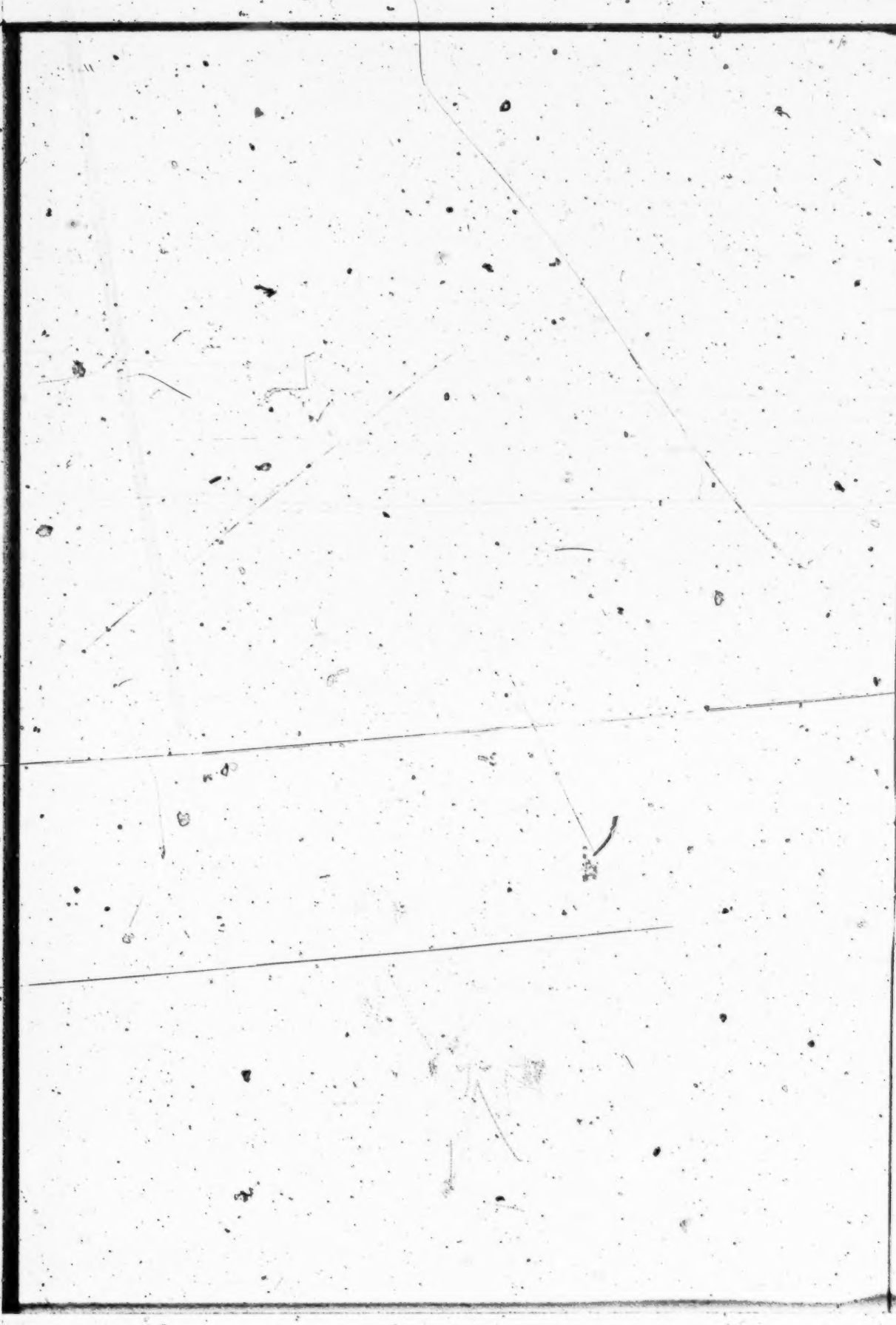

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JURISDICTIONAL STATEMENT

To the Honorables, the Judges of the United States Supreme Court:

I.

There are no official or unofficial reports of any opinion or opinions of any court below.

II.

The jurisdiction of this Honorable Court is invoked upon the following grounds:

(a) This proceeding was effectuated on August 4, 1958 when the West Virginia Board of Dental Examiners and the then constituent members of said Board (hereinafter referred to as "Dental Board" and "Board Members") filed their amended and supplemental bill of complaint in the Circuit Court of Cabell County, West Virginia, which after allegation of jurisdictional facts, the powers and duties of the Dental Board, and charging Harry C. Devore, appellant herein (hereinafter referred to as "Devore") with practicing dentistry without a license in contravention of Chapter 30, Article 4 of the Code of West Virginia, prayed for a temporary and permanent injunction enjoining, restraining and inhibiting Devore "from doing any acts constituting the practice of dentistry or of dental hygiene within the State of West Virginia without prior licensing by the West Virginia Board of Dental Examiners x x x". After hearing upon a companion case which the parties, by counsel, agreed would control the present case, the Circuit Court of Cabell County, West Virginia on October 6, 1958 entered an order perpetually enjoining Devore "from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or the practice of dental hygiene as defined by statute without first having been licensed thereto by the West Virginia Board of Dental Examiners or a successor body".

On August 4, 1966 the Dental Board and successor Board Members filed in the same Circuit Court a petition alleging that Devore had refused entry and inspection of his premises by a member of the Dental Board under the provisions of Chapter 30, Article 4, Section 4a of the West Virginia Code, which was amended by Chapter 108 of the Acts of the West Virginia Legislature, 1961 Regular Session, to include the

language hereinafter underscored. The entire section reads as follows:

Powers and Duties.—The West Virginia Board of Dental Examiners shall examine all qualified applicants for license to practice dentistry or dental hygiene, and it shall license all such applicants who are qualified under applicable statutes and who pass the examinations that may be required by statute or by any legally adopted rule or regulation.

The said Board shall have the power to make such examination of all applicants appearing before it for any type of license as may be necessary to determine that the applicant is qualified. The said Board shall also have the power to revoke or suspend any license issued by it, for cause, after having given the person whose license is sought to be revoked or suspended, an opportunity to be heard in the manner provided by section eight, article one, chapter thirty of this Code. It shall have the power to reinstate any license revoked or suspended by it.

The said Board is authorized and empowered to hold and conduct hearings and investigations on the issuance, suspension, revocation, or reinstatement of licenses and on charges of unauthorized practice of dentistry or dental hygiene.

The Board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this state, and to obtain access to, make inspection of, and request information regard-

ing any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance by such dental laboratory or other person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and of any such dental prosthesis. For the purpose of this paragraph the definition of terms contained in subsection A of section two-a of this article is made expressly applicable.

At that time and previous to the aforesaid legislative amendment Chapter 30. Article 4, Section 18, in *pari materia*, contained the following language:

> Any person who shall practice or offer to practice dentistry or dental hygiene in this state without first having complied with the provisions of this article, or who shall violate any of its provisions for which no specific penalty has been provided, shall be guilty of a misdemeanor, and upon conviction thereof of a first offense against this article, shall be fined not less than three hundred dollars nor more than one thousand dollars, or confined in jail not less than three months nor more than six months, or both fined and imprisoned at the discretion of the court.
>
> A person convicted of a second subsequent offense

against this article shall be guilty of a misdemeanor and shall be fined not less than one thousand dollars nor more than twenty-five hundred dollars, or confined in jail for not less than six months nor more than twelve months, or both fined and imprisoned, at the discretion of the court.

Each act of dentistry or dental hygiene shall be deemed a separate offense and shall constitute a practice of dentistry or dental hygiene within the meaning of this section, and each day that a person may hold himself out as practicing in his own name or any name shall be deemed a separate offense.

Notwithstanding the existence of any other remedy, the Board may, in the manner provided by law, maintain an action for an injunction against any person, partnership, or association to restrain or prevent the practice of dentistry and/or dental hygiene when such person, partnership or association repeatedly refuses to obtain registration or license therefor and constitutes the practice of dentistry and/or dental hygiene without first obtaining registration or license therefor in the manner hereinbefore provided.

The petition further alleged certain matters upon which no evidence was adduced or sought to be adduced, and certain other evidence was offered by way of oral testimony which was stricken on motion of counsel for Devore. Nevertheless, and in spite of the fact that there was not a scintilla of evidence introduced to demonstrate even *prima facie* that the injunction awarded eight years previously had even been violated. the trial court permitted an amendment to the 1958 order permitting inspection of appellant's premises in the language of the statute above quoted.

Thereafter Devore, by counsel, filed his petition for an appeal and supersedeas in the Supreme Court of Appeals of West Virginia, the highest judicial tribunal in said State upon the ground that said order of the trial court applied the statute above quoted in an unconstitutional manner whereby the appellant is subject to "unreasonable search or seizure" in contravention of the Fourth Amendment to the Constitution of the United States.

(b) On the 5th day of June, 1967, the Supreme Court of Appeals of West Virginia entered an order refusing to allow the appeal and supersedeas prayed for by Devore.

(c) This appeal is taken pursuant to 28 U.S.C. 1257(2).

(d) The following cases are believed to sustain the jurisdiction of the Court:

Camara v. *Municipal Court of San Francisco*, ... U. S. ..... 18 L ed 2d 930, 87 S. Ct.....;

See v. *City of Seattle*, ...U. S....., 18 L ed 2d 943, 87 S. Ct.....;

Wolf v. *Colorado*, 338 U. S. 25, 93 L ed 1782, 69 S. Ct. 1359;

Ker v. *California*, 374 U. S. 23, 10 L ed 2d 726, 83 S. Ct. 1623;

Go-Bart Importing Co. v. *United States*, 282 U. S. 344, 75 L ed 374, 51 S. Ct. 153;

Amos v. *United States*, 255 U. S. 313, 65 L ed 654, 41 S. Ct. 266;

Silverthrowe Lumber Co. v. *United States*, 251 U. S. 385, 64 L ed 319, 40 S. Ct. 182, 24 ALR 1426;

Oklahoma Press Pub. Co. v. *Walling*, 327 U. S. 186, 90 L ed 614, 66 S. Ct. 494, 166 ALR 531.

The questions presented by this appeal are:

(i) Is the inspection statute, West Virginia Code, Chapter 30, Article 4, Section 4a to be found in Volume 1 of the 1961 West Virginia Code at Page 1594, quoted at length above, authorizing entry by a state administrative official upon appellant's premises appurtenant to his home without first obtaining a warrant therefor, where a statute in *pari materia*, West Virginia Code, Chapter 30, Article 4, Section 18, to be found in Volume 1 of the 1961 West Virginia Code at page 1597, also quoted in full above, repugnant to and violative of the Fourth Amendment to the Constitution of the United States?

(ii) Is the decision of this case controlled by *Roland Camara* v. *The Municipal Court of the City and County of San Francisco*, ... U. S. .....19 L ed 2d 930, 87 S. Ct..... and *Norman See* v. *City of Seattle*, ...U. S..... 18 L ed 2d 943, 87 S Ct....., both decided by this Honorable Court on June 5, 1967?

III.

STATEMENT OF THE CASE

At the time of the filing of the original bill of complaint by the Dental Board and Board Members the appellant Devore had a laboratory in the City of Huntington, West Virginia where he conducted ceramic fabrication as well as experimentation. After the entry of the 1958 decree by the Circuit Court of Cabell County, West Virginia referred to above Devore closed the laboratory in down town Huntington.

On his premises, a short distance from the corporate limits of the Village of Barboursville, also in Cabell County, West Virginia, where he has resided for many years, he built an addition or annex to his dwelling house within the grounds enclosed for residential purposes. At the time of the filing of the original proceeding in 1958 there was no statutory authorization for inspection of premises, as was contained in Chapter 30, Article 4, Section 4a of the West Virginia Code, which statute was enacted by the 1961 Session of the West Virginia Legislature. On the ..... day of July, 1966 one Doctor Robert M. Wild, a practicing dentist of Huntington, purportedly under authorization of the Dental Board, came to the home of Devore and demanded of him that Wild be permitted to examine and inspect the laboratory located in said home by virtue of the statute above cited and quoted. Devore demanded the production of a warrant and upon failure of Wild to produce one refused admittance to the interior of the house to Wild. Another attempt was made by a person, or persons, representing themselves to be agents of the Dental Board, to gain admission to the home of Devore by virtue of this self same statute, without the production of a warrant. Again admission and inspection were refused. Whereupon the Dental Board through the offices of the Attorney General of the State of West Virginia, instituted this proceeding by filing a petition in the Circuit Court of Cabell County.

At the hearing on the petition, which was in the nature of a hearing upon contempt, the Dental Board attempted to prove a violation of the 1958 injunction decree by introducing as a witness one B. F. Skeens, who testified that he had been fitted for artificial dentures by some person in the City of Kenova, Wayne County, West Virginia, whose name he did not know and who apparently did not identify himself to Mr. Skeens, and further could not identify the appellant

Devore as that person, although Devore was present at the counsel table in the courtroom in plain view of the witness. Whereupon counsel for Devore moved to dismiss the petition and the proceedings, which the trial court declined to do and allowed the Dental Board, through the office of the West Virginia Attorney General, to amend the eight year old order in the language of Chapter 30, Article 4, Section 4a of the 1961 West Virginia Code above cited and quoted, so as a practical matter to allow inspection and examination of apppellant's premises without procuring and exhibiting a warrant so to do, as provided by law.

The Constitutional question involved was raised in the trial court by the motion of counsel for the apppellant to dismiss an objection to the amendment of the 1958 order by the trial court of its own motion to the hearing on the petition filed by the Dental Board and the Board Members. Thereafter the court overruled the motion and objection and allowed the amendment of the order complained of. See Transcript of proceedings had and testimony taken before Honorable John W. Hereford, Judge, on Friday, the 16th day of September, 1966, at Pages 50. et seq. The appeal from the order of the Circuit Court of Cabell County, West Virginia to the Supreme Court of Appeals of West Virginia was based entirely upon the grounds that the statute and the order incorporating the statute above cited and quoted was repugnant and in violation of the Fourth Amendment to the Consitution of the United States, as well as a similar constitutional provision contsined in the West Virginia Constitution adopted in 1872, which will more fully appear from the petition of appellant to the court of last resort of West Virginia, filed with the record herein. The Supreme Court of Appeals of West Virginia refused to review the matter and grant an appeal to Devore implicity on the ground that said inspection statute above cited and quoted was and is con-

stitutional, both with respect to the Federal and the State Constitutions.

IV.

FEDERAL QUESTIONS

It is felt that the federal questions presented are substantial upon the following grounds:

(a) The statute drawn into question, namely, Chapter 30, Article 4a, of the 1961 West Virginia Code, above cited and quoted, is an enactment of the highest legislative body of the state, presumably under the police power of the state. This statute, it is earnestly submitted on behalf of the appellant, is repugnant to the Fourth Amendment of the Constitution of the United States, and such question can only be decided by this Honorable Court.

See *Camara* vs. *The Municipal Court of San Francisco*, ...U. S.....18 L ed 2d 930, 87 S. Ct.....; *See* vs. *The City of Seattle*, ...U. S.....18 L ed 2d 943, 87 S. Ct.....; *Ker* vs. *California*, 374 U. S. 23, 10 L ed 2d 726, 83 S. Ct. 1623. and cases cited supra.

(b) The rulings of both the Circuit Court of Cabell County, West Virginia and the West Virginia Supreme Court of Appeals, the court of last resort in the state, by refusing to review and reverse the Circuit Court by its effect sustained the validity of the statute as against the Fourth Amendment to the United States Constitution. While the West Virginia Supreme Court of Appeals did not deliver a written opinion on the merits herein, a copy of the order of that court is appended hereto to demonstrate the finality of its ruling in view of the fact that no reapplication or rehearing of the

matter can be had after the expiration of eight (8) months from the date of the ruling of the Circuit Court of Cabell County, under West Virginia law. See Chapter 58, Article 5. Section 4 of the 1961 Code of West Virginia, which reads as follows:

> "No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment decree or order, whether the state be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented."

This appellant. therefore. is precluded from any further relief from the order of the Circuit Court of Cabell County and in effect affirmed by the Supreme Court of Appeals of West Virginia. save by an appeal granted by this Honorable Court.

Respectfully submitted,

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